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IN THE

Supreme Court of the United States

October Term, 1967

No. 1322

In the Matter of IRA HAUPT & CO.,
a Limited Partnership,

Bankrupt,

KAMERMAN & KAMERMAN,

Petitioner,

CHARLES SELIGSON, as Trustee in Bankruptcy of
IRA HAUPT & CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Kamerman & Kamerman, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on February 2, 1968. The judgment of the Court of Appeals for the Second Circuit affirmed an order of the United States District Court for the Southern District of New York, which order denied a petition for review of an order made by the Referee in Bankruptcy. The order of the Referee had denied petitioner's motion to dismiss an application by Respondent as barred by the Statute of Limitations. This order of the Referee reversed on reargument an earlier written opinion by the Referee which had concluded that Petitioner's motion should be granted.

Opinions Below

The opinion of the Court of Appeals has not as yet been reported. It is reproduced in Appendix A hereto, page A1.

The opinion of the District Court has not as yet been reported. It is reproduced in Appendix A hereto, page A12.

The original opinion of the Referee in Bankruptcy was not formally reported and is reproduced in Appendix A, page A23.

The opinion of the Referee on reargument was not formally reported and is reproduced in Appendix A, page A28.

Jurisdiction

The opinion of the Court below (Appendix A, p. A1) was entered on February 2, 1968. A timely petition for rehearing was denied on March 20, 1968. The jurisdiction of this Court is invoked under 28 USC 1254(1).

Question Presented

Does the "date of adjudication" in Section 11(e) of the Bankruptcy Act refer to the actual date of adjudication of a bankrupt or does it continue to refer to the "constructive date of adjudication", the date on which there was filed in behalf of said bankrupt a petition for an arrangement under Section 321 of the Bankruptcy Act, despite the dismissal of the Chapter XI proceeding?

Statutes Involved

The following statutory provisions are set forth in Appendix B.

Bankruptcy Act

Section 11(e), 11 USC 29(e)
Section 301, 11 USC 701
Section 302, 11 USC 702
Section 321, 11 USC 721
Section 322, 11 USC 722
Section 378, 11 USC 778

Statement of Facts

During 1963 and for a considerable period prior thereto, Ira Haupt & Co. (Haupt) had been engaged in a general brokerage and commission business. In the fall of 1963 as a result of the now famous "Salad Oil Swindle", Haupt found itself in dire financial straits and was suspended by the New York Stock Exchange. Since Haupt was unable to extricate itself from its financial difficulties, an involuntary petition in bankruptcy was filed against it by certain of its limited partners on March 23, 1964.

On March 30, 1964, a petition under Section 321 of the Bankruptcy Act, 11 USC 721, was filed praying that proceedings be had with respect to Haupt under Chapter XI of said Act.

On June 26, 1964, an order of the Referee in Bankruptcy dismissed the Section 321 petition for an arrangement and adjudicated Haupt a bankrupt.

Respondent was appointed Trustee and has acted as such since he qualified on October 7, 1964.

Petitioner had filed with the Bankruptcy Court a proof of debt in the amount of $11,600.

By notice of motion dated May 20, 1966, Respondent Trustee instituted a proceeding objecting to petitioner's proof of claim and requested that the claim be disallowed unless petitioner surrendered and turned over to the bankrupt estate the sum of $20,700 with interest which petitioner had received from the bankrupt and which the Respondent Trustee claimed represented a voidable preference.

Petitioner moved to dismiss Respondent Trustee's application and objection as time barred. In his original decision, the Referee agreed with petitioner and dismissed the Trustee's application (A23). On reargument, the Referee reversed himself and held that the Trustee's application was timely (A28). The District Court's affirmance (A12) of the Referee was up held by the Court of Appeals (A1).

Reason for Granting Writ

Petitioner submits (1) that in this case, the Court of Appeals for the Second Circuit has decided an important question of Federal Bankruptcy Law not heretofore determined by this Court, which Petitioner respectfully submits should be settled by this Court. Aside from this being a case of first impression, the question presented is of importance in the administration of the Federal Bankruptcy Law; and (2) the said Court of Appeals has decided this question in a way which is not in accord with the views of leading texts on the subject.

1. The Federal Questions Herein Have Not Heretofore Been Determined by This Court

The basic question in this case would not seem to have ever come before this Court, nor has it been determined by other Courts of Appeal. It is not only unique and novel but also important in the administration of the Bankruptcy Act.

Petitioner submits that the question is one of substance and merits the consideration of this Court because of the lack of any decisions on the question involved. As will be hereafter shown, the opinion of the Court of Appeals for the Second Circuit is at variance with the views of the leading texts in the Bankruptcy field.

2. The Federal Questions Herein Have Been Decided Below in a Way Which Is Not in Accord With the Learned Texts

A. The basis of petitioner's original motion was that the two year period of limitation set forth in Section 11(e) of the Bankruptcy Act began to run on March 30, 1964, the date of the filing of the Haupt Chapter XI petition, so that the Respondent Trustee's application commenced on May 20, 1966 was time-barred on March 30, 1966. In support of this contention, petitioner relied on Section 302 of the Act, 11 USC Section 702, which provides in part:

> "and the date of adjudication shall be taken to be the date of the filing of the petition under Section 321 or 322 of this Act, except where an adjudication had previously been entered."

The Court of Appeals disagreed with petitioner's contention that by virtue of Section 302 of the Bankruptcy

Act, the Statute of Limitations began to run from the date of the filing of the Chapter XI petition, March 30, 1964, as a result of which the Trustee's application would have been time-barred.

The Court of Appeals was of the opinion that "after a petition for an arrangement has been dismissed, we are no longer dealing with a proceeding under Chapter XI", and, therefore, held that Section 302 was inapplicable.

The Court's conclusion that Section 302 relates only to the application of the provisions of Chapters I to VII to a Chapter XI proceeding, while the Chapter XI proceeding is ongoing is contrary to *Collier.*

In 8 *Collier,* Bankruptcy, Par. 1.05, page 14, it is stated:

> "It is immaterial under Section 302 that during the Chapter XI administration of the case an adjudication is entered in the pending bankruptcy proceeding, pursuant to the provisions of Chapters I to VII. * * * references to the *date of adjudication* are still construed to refer to the date of the filing of the Section 321 petition, not to the subsequent date of adjudication." (Emphasis supplied.)

and

> "A petition under Section 321 of Chapter XI is filed in a pending bankruptcy proceeding, and it may be filed before or after adjudication in that proceeding. If it is filed after adjudication in the pending bankruptcy proceeding, then Section 302 makes it clear that any reference to the date of adjudication in an applicable provision of Chapters I to VII, such as in Section 60c, continues to refer to that adjudication and is not to be construed to refer to the date of filing of the Section 321 petition. But where a petition under Section 321 is filed in a

> pending bankruptcy proceeding before adjudication therein, then the indicated reference to the date of adjudication must be construed to refer to the date of the filing of the Section 321 petition."

The Court of Appeals sought to bolster its ruling that Section 302 was inapplicable by misplaced reliance on Section 301 which provides that the provisions of Chapter XI apply exclusively "to" proceedings under Chapter XI. However, Section 301 does not say that its provisions apply only during the Chapter XI proceeding. The provisions of Chapter XI have no application only where no proceeding was ever pending under Chapter XI. In this regard, *Collier* says:

> "It is only where a proceeding was never pending under Chapter XI that the provisions of that Chapter have no application whatsoever to it * * *". (8 *Collier*, Bankruptcy, Par. 1.01, page 4)

Whatever its later disposition, the Section 321, Chapter XI proceeding did occur. There was a time when Section 302 was applicable and the two year period under Section 11(e) did commence to run. What the Court of Appeals decided here as a matter of first impression was that rights which had accrued could be abrogated because the Chapter XI proceeding had been dismissed. If the Chapter XI proceeding had been successfully concluded, there is no question that the "date of adjudication" for purposes of Section 11(e) would have been March 30, 1964, the date of filing of the Chapter XI petition. The fact that the Chapter XI proceeding was dismissed should not take away rights already acquired.

It is apparent both in the language of Section 302 and in the philosophy of the Bankruptcy Act that the filing of a

Chapter XI petition, whether it be an original petition under Section 322 or a petition in a pending proceeding under Section 321, does constitute the "date of adjudication" within the meaning of Section 11(e).

Clearly the two years did start running when the Chapter XI petition was filed. Nowhere in the words, philosophy or purpose of the Bankruptcy Act is there any reasonable basis to say that, in some peculiar situations, the two year period provided in Section 11(e) means two years plus. The "date of adjudication" must mean the first "date of adjudication" not each successive "date of adjudication". This is why Section 302 provides that the date of filing such petition is the "date of adjudication" *except where an adjudication had previously been entered.*

Petitioner submits that once a "date of adjudication" has occurred, the two year period not only commences to run but does run from that date and runs continuously. There cannot be successive "dates of adjudication" under Section 11(e).

It is clear that once a Chapter XI petition has been filed, either under Sections 321 or 322, and, thereafter, the Chapter XI proceeding is dismissed, and bankruptcy is directed to be proceeded with, the "date of adjudication" is the date of the filing of the Chapter XI petition, unless there has been a prior adjudication.

Substantially identical provisions as in Section 302 apply to Chapter XII proceedings (real property arrangements by individuals) and Chapter XIII proceedings (wage earners' plans), Sections 402 and 602.

Collier repeatedly refers to the filing of a Chapter XI petition as operating as a constructive adjudication. 8 *Collier,* Par. 1.05, 2.31, 3.11(2), 4.03 (N. 11), 4.16(10) and

6.01. This constructive adjudication is given effect in various Chapter XI provisions.[1]

B. The Court of Appeals disagreeing with petitioner's contention as to Section 302 fixed Haupt's "date of adjudication" for the purpose of Section 11(e) of the Bank-

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[1] Section 312 of Chapter XI provides that, where not inconsistent with the provisions of the chapter, the jurisdiction, powers and duties of the Court shall be the same

> "(1) where a petition is filed under section 321 of this Act and a decree of adjudication has not been entered in the pending bankruptcy proceeding, as if a decree of adjudication had been entered in such bankruptcy proceeding at the time the petition under this chapter was filed; * * *".

Section 352 provides:

> "Where not inconsistent with the provisions of this chapter, the rights, duties, and liabilities of creditors and of all other persons with respect to the property of the debtor shall be the same. where a petition is filed under section 321 of this Act and a decree of adjudication has not been entered in the pending bankruptcy proceeding, as if a decree of adjudication had been entered in such bankruptcy proceeding at the time the petition under this chapter was filed, or, where a petition is filed under section 322 of this Act, as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered at the time the petition under this chapter was filed."

Section 341 provides:

> "Where not inconsistent with the provisions of this chapter, the powers and duties of the officers of the court and, subject to the approval of the court, their fees, and the rights, privileges and duties of the debtor shall be the same, where a petition is filed under section 321 of this Act and a decree of adjudication has not been entered in the pending bankruptcy proceeding, as if a decree of adjudication had been entered in such bankruptcy proceeding at the time the petition under this chapter was filed, or, where a petition is filed under section 322 of this Act, as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication has been entered at the time the petition under this chapter was filed."

ruptcy Act as June 26, 1964, the actual date of adjudication and started the running of the Statute of Limitations from that date. This, of course, "infused new life" into the Respondent Trustee's application. The basis of the Court's fixation of June 26, 1964 as the "date of adjudication" was its construction of Section 378(1), 11 USC 778(1) which provides:

> "Upon the entry of an order directing that bankruptcy be proceeded with—
>
> (1) in the case of a petition filed under Section 321 of this Act, the bankruptcy proceeding shall be deemed reinstated and thereafter shall be conducted, so far as possible, as if such petition under this chapter had not been filed; . . . "

The Court applied Section 378 to this case by saying: "If the Chapter XI petition 'had not been filed' * * * ", adjudication would not occur until June 26, 1964. But this begs the question for a viable Chapter XI petition *was* filed. The Court's decision to start the Statute of Limitations on June 26, 1964 arbitrarily consigns to oblivion the events in the Chapter XI proceeding between March 30, 1964 and June 26, 1964. The phrase "so far as possible" which appears in Section 378(1) grants the Court some license, but to make the Chapter XI filing and proceeding an "unevent" is not reasonable and goes beyond that license.

Although there is nothing in Section 378(1) dealing with "date of adjudication", the Court of Appeals concluded that when a Section 321 petition has been dismissed, that is the controlling section.

In arriving at its conclusion that Section 378(1) was the controlling section, the Court gave substantive effect to

its provisions. However, Section 378 apparently was included in the Bankruptcy Act for purposes of clarity only and not as a substantive provision. A member of the drafting committee of the Chandler Act has pointed out that Section 378 is patterned after Section 238 of Chapter X and has further pointed out, in discussing the provisions of Section 238(1), which are substantially identical with Section 378(1) that "the provision, except for clarity, would appear unnecessary". *Weinstein, The Bankruptcy Law of 1938,* pp. 289 and 243. To the same effect as respects Section 238(1) is 6A *Collier,* Par. 12.05(2) N. 12.

Indeed, the Referee in Bankruptcy in this case reached the same conclusion in his first decision when he said:

> "Section 378(1) of the Act is a general provision governing subsequent procedures in an ensuing bankruptcy. The revived bankruptcy proceeding by the terms of the Statute shall be conducted only *so far as possible* as if the arrangement proceeding had not been filed. Section 378 was new when enacted in the Chandler Act. Its provisions were patterned after Section 238. Subdivision 1 of Section 378 appears to be unnecessary except for clarity. This has been noted by a member of the Drafting Committee of the Chandler Act." (Emphasis in original.)[2]

Section 378 apparently is merely a clarifying but technically unnecessary provision of the Act. In a Section 321 case, even without Section 378, the result would be as provided in Section 378(1) when a Section 321 petition is dismissed. This is true because the Section 321 petition

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[2] *Weinstein,* The Bankruptcy Law of 1938, A Comparative Analysis, pages 289, 243.

does not dismiss the pending Chapters I to VII proceeding. If not stayed, the Chapters I to VII proceeding continues. If the Chapters I to VII proceeding is stayed, the stay is effective only so long as the Section 321 proceeding continues. In either event, even without Section 378(1), the Chapters I to VII proceeding obviously would be fully reactivated upon dismissal of a Section 321 petition because the sole impediment to its full progress has been removed.

Section 378(1) speaks in futurity and deals only with the manner in which the actual bankruptcy proceeding shall "thereafter" be conducted. Section 378(1) does not by its terms say that the past is forgotten or wiped out. It does not purport to wipe the slate clean. It does not say that the Section 321 proceedings are a nullity or void *ab initio*.

Indeed, Section 378(1) only mandates that the bankruptcy proceeding shall be conducted "so far as possible" as if the Section 321 petition had not been filed.

The Court of Appeals relied on 9 *Collier*, Bankruptcy, Par. 10.10, p. 510, for the applicability of Section 378 rather than Section 302 to this proceeding. Yet, in the same paragraph on which the Court relied, but omitted from its opinion, *Collier* says:

> "That does not mean the steps already taken under Chapter XI become a nullity * * *. But the steps taken in the administration of the estate under Chapter XI retain their validity in the subsequent bankruptcy administration of the proceeding. * * * The provisions of Chapters I to VII are to govern the proceeding only 'so far as possible' in view of what had already transpired."

It is clear from *Collier* that the provisions of Section 378(1) in all events deal only with the conduct of the bankruptcy proceedings. Section 378(1) says nothing about wiping out rights of third parties not parties to the bankruptcy proceedings or wiping out events that have happened and which, with the passage of time, create or have created rights or defenses. In short, it is clear that the words "so far as possible" in Section 378(1) mean only so far as possible in view of what has occurred. One of the things which had occurred was the fixation of the "date of adjudication" by reason of the filing of the Chapter XI petition. In this sense, it is not possible to ignore the passage of time and turn the clock ahead to a new "date of adjudication."

Section 378 has no bearing on the "date of adjudication" or on the Statute of Limitations but merely lays down the ground rules for the effective administration of an estate in bankruptcy under Chapter I to VII in the event a Chapter XI proceeding has been dismissed. Collier substantiates this view.[3]

C. The Court of Appeals was also of the opinion that there was a difference between a Section 321 and 322 petition because of the wording of Section 378.

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[3] "Section 378 deals in general with the future conduct of the proceeding in the event of 'the entry of an order that bankruptcy be proceeded with' in a Chapter XI case." 9 *Collier Bankruptcy*, Par. 10.12, page 516.

"In both a Section 321 and a Section 322 case, the general effect of Section 378 thus is that the proceeding is no longer administered pursuant to the provisions of Chapter XI, but is thereafter administered pursuant to the provisions of Chapters I to VII, which deal with the ordinary bankruptcy proceeding commenced by the filing of a petition for adjudication in bankruptcy." 9 *Collier Bankruptcy*, Par. 10.10, page 509.

It may be noted at the outset that neither Section 378(1) nor Section 378(2) deals with anything except the future conduct of the proceedings. Section 378 does not undertake to set forth substantive rights, but, rather, defines the provisions under which future proceedings in the bankruptcy court shall be conducted.

An analysis of the different situations existing when Section 378 becomes applicable to a Section 321 case and to a Section 322 case amply demonstrates that any argument grounded upon mere differences between the wording of Section 378(1) and Section 378(2) would be wholly superficial and speculative. Both Section 378(1) and Section 378(2) direct that future proceedings shall be under the provisions of Chapter I-VII. As said by *Collier*:

> "... In both a Section 321 and Section 322 case, the general effect of Section 378 thus is that the proceeding is no longer administered pursuant to the provisions of Chapter XI, but is thereafter administered pursuant to the provisions of Chapters I to VII, which deal with the ordinary bankruptcy proceeding commenced by the filing of a petition for adjudication in bankruptcy...." (9 *Collier*, Bankruptcy, Par. 10.10, page 509.

Thus, according to *Collier*, the difference in the wording of Sections 378(1) and 378(2) produce the same basic result, i.e., the future administration of the proceedings pursuant to the provisions of Chapters I-VII. Consequently, the differences in wording do not indicate a different intended basic result. They merely recognize the inherent differences already existing in the nature and effect of the two types of Chapter XI proceedings.

The provisions of Section 378(2) here discussed, which relate to a Section 322 petition, do two things on their

face: One, they provide for or make clear, for the purposes of the future proceedings pursuant to the provisions of Chapters I-VII, the date that is to be treated as the date when the bankruptcy proceedings was commenced, and two, they provide for or make clear, for such purposes, that the Section 322 petition shall be treated as if it were a voluntary petition under Chapters I-VII filed on the date that it was in fact filed.

When Section 378(2), with respect to an original Section 322 petition under Chapter XI, specifically refers to the date of filing the Section 322 petition as the significant date of filing for purposes of the later administration of the estate under the provisions of Chapters I-VII, it is referring to a date for those purposes that must be fixed or clarified. It is clarifying to avoid any contrary assertion, and selects the earliest possible date. Such provision would be inappropriate in Section 378(1) because there is already such a date prior to the filing date of the Section 321, Chapter XI petition. Thus, one explanation for the different wording of Sections 378(1) and 378(2) is that Section 378(2) is fixing or clarifying, for purposes of future application of the provisions of Chapter I-VII, a date with respect to a Section 322 proceeding that is already fixed and clear with respect to a Section 321 petition, i.e., the date of filing the petition for purposes of applying the provisions of Chapters I-VII.

Further, a Section 321 petition may be filed after a prior adjudication in the Chapter I-VII proceedings. Obviously, in such circumstances, it would be wholly inappropriate for Section 378 (1) to provide, as does Section 378 (2), that the proceeding shall thereafter be conducted as if a decree of adjudication had been entered on the day of filing the Chapter XI petition. This would just ignore any such prior adjudication in a Section 321

case. It is true that Section 378 (1) could have been so worded as to contain a provision similar to Section 378 (2) but expressly limited in application to those Section 321 cases in which there had been no such prior adjudication, and, thus, at least to this extent, could have been consistently worded with Section 378 (2) if the same results had been intended. But, for other wholly separate reasons, the use of such wording in Section 378 (1), even as so limited, would have conflicted with still other provisions of the Act, as next described.

In the case of a Section 322 petition, there are four sections of the Act pursuant to which Section 378 (2) might become applicable. These are Sections 327, 376, 377 and 386. Under each of the first three of these sections, the Court has two, but only two, options. The Court may simply dismiss the Chapter XI proceeding, in which event the proceeding is over and Section 378 never becomes applicable. Or the Court may adjudge the debtor a bankrupt and direct that bankruptcy be proceeded with. Under the fourth of the sections, Section 386, the Court must adjudge the debtor a bankrupt and direct that bankruptcy be proceeded with. In all such cases, the adjudication may only be made after a hearing after notice. Consequently, Section 378 (2) can never beome applicable unless there has already been a formal hearing after notice and a formal decree of adjudication. And when it does become applicable, Section 378 (2) fixes the time of such adjudication, for purposes of the future Chapter I-VII proceedings, as the earliest possible date, i. e., the date of filing the Chapter XI petition and not the later date of the formal adjudication.

The situation is somewhat different in a Section 321 proceeding to which Section 378 (1) applies. There are three sections pursuant to which Section 378 (1) can

become applicable to a Section 321 proceeding. These are Sections 376, 377 and 386. Under Section 376, the Court may dismiss the Section 321 proceeding and direct that bankruptcy be proceeded with, but it may not adjudge the debtor a bankrupt. No hearing or notice is required for such an order. In contrast, under Section 377 the Court may not simply dismiss a Section 321 proceeding but must couple such dismissal with an adjudication if there has been no prior adjudication. And under Section 386, the Court must adjudge the debtor a bankrupt, but does not dismiss the Section 321 proceeding. And in both of these latter cases, there also must be a hearing after notice.[4] (As noted above, these latter situations where there is an adjudication under Chapter XI in a Section 321 case illustrate why Section 378 (1) cannot mean that the Chapter XI proceeding is a nullity once Section 378 (1) is applicable.)

> "Where bankruptcy is directed in a Section 322 case, whether under Section 327, 376, 377 or 386 (1), the debtor must also be adjudged a bankrupt . . . If bankruptcy is directed in a Section 321 case, under Section 377 or Section 386 (1), the debtor must also be adjudged a bankrupt if not previously so adjudged . . . If bankruptcy is directed in a Section 321 case under Section 376, the court is not empowered by that section to adjudge the debtor a bankrupt even though he has not been previously so adjudged . . . If the debtor was not previously adjudged a bankrupt at the time of the order under Section 376, directing bankruptcy in a Section 321 case, then in the subsequent bankruptcy administration of the proceeding he must either be adjudged a

[4] Section 377 expressly so provides. Section 386 does not, but is so construed. 9 *Collier, supra* (11.05(3)).

bankrupt or the bankruptcy petition must be dismissed . . . " (9 *Collier, supra,* (10.10, n. 10)).

Thus, Section 378 (2), applicable to a Section 322 case, can never become operative until the Court has already held a hearing upon notice and determined both that the Chapter XI proceeding should end and that the debtor should be adjudged a bankrupt, and then has adjudged the debtor bankrupt. Consequently, Section 378 (2) can be quite categorical about treatment of the matters it deals with. On the other hand, Section 378 (1) can become operative in circumstances where the Court has not held such a hearing and has not adjudged the debtor a bankrupt. In that event, the debtor is still entitled to his day in Court to attempt to defeat an adjudication. Thus, Section 378 (1), for this reason alone, could not simply contain the same provisions as Section 378 (2), even if such provisions were limited in application to Section 321 cases where there had not already been a prior adjudication.

Petitioner submits that the above illustrates why Section 378 (1) and Section 378 (2) had to be worded differently. They are sound, valid reasons founded on other specific provisions of Chapter XI. It is indisputable that other different and more complex wording could have been used in Section 378 (1) to take account of such matters. That, however, is not the point. The point is that, as respects the question of "date of adjudication" for purposes of Section 11 (e), any argument based on the mere fact that Section 378 (1) is worded differently than Section 378 (2) would involve viewing Section 378 in a vacuum in order to draw an inference that different results were intended in a Section 321 case and a Section 322 case. A reading of intention into the Act by inference drawn from a difference

in wording must necessarily be on the basis that such a difference in intention must be assumed in order to explain that difference in wording. As is demonstrated above, there are clear and compelling other reasons that adequately explain why the wording is different. And each such other reason finds direct support in another express provision of Chapter XI.[5] As stated by *Collier*, the basic purpose of the two provisions is still the same, i. e., to provide for the future administration of the case under the provisions of Chapters I-VII. The difference in wording of Section 378 (1) and Section 378 (2) is at most, merely neutral as respects the question here at issue. Conceivably a different result might have been intended. But there are too many other reasons for the difference in wording simply to find such an intention by inference based solely on such difference in wording. Other considerations must be taken into account.

As pointed out earlier, Section 378 apparently is merely a clarifying but technically unnecessary provision of the Act. In a Section 321 case, even without Section 378, the result would be as provided in Section 378 (1) when a Section 321 petition is dismissed. This is true because the Section 321 petition does not dismiss the pending Chapter I-VII proceeding. If not stayed, the Chapter I-VII proceeding continues subject only to the controlling provisions of Chapter XI while the Section 321 proceeding continues. If the Chapter I-VII proceeding is stayed, the stay is effective only so long as the Section 321 proceeding continues. In either event, even without Section 378 (1), the Chapter I-VII proceeding obviously would be fully reactivated upon dismissal of a Section 321 petition because the sole impediment to its full progress has been removed.

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[5] Cf. 8 *Collier, supra* (5.49 (12.2)), for a discussion of the reasons for the trustee provision in 378(2) that are not contained in 378(1).

As concerns a Section 322 petition, Section 302, already provides that the date of filing the Section 322 petition is the date of filing for purposes of applying Chapters I-VII as well as the "date of adjudication". Section 312 (2) already provides that the jurisdiction, powers, and duties of the Court are the same as if a voluntary petition for adjudication had been filed, and a decree entered, on the date of filing the Section 322 petition. The provisions of Section 378 (2) relating to appointment of a trustee merely repeat the mandate of Section 338 with some few added mechanical provisions. It is apparent that Section 378 was included for clarity, not for substance. The difference in wording of Section 378 (1) and Section 378 (2) merely recognizes differences in a Section 321 case and a Section 322 case resulting from other provisions of the Act. Section 378 does not introduce or create any such difference.

CONCLUSION

The issues involved herein have far reaching consequences in bankruptcy as they relate to "date of adjudication" and the applicability of the Statute of Limitations. To resolve a substantial Federal question, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

Opinion of United States Court of Appeals for the Second Circuit

MOORE, *Circuit Judge*:

This appeal represents yet another of the many controversies arising out of the financial collapse and ensuing bankruptcy proceeding of Ira Haupt & Co. ("Haupt").[1] Haupt had been engaged in a general brokerage and commission business. In the fall of 1963, as a result of what has come to be known as the "Salad Oil Swindle," Haupt found itself in dire financial straits and was suspended from trading by the New York Stock Exchange. On March 23, 1964, an involuntary petition in bankruptcy was filed with the district court against Haupt.

Between December 1963 and March 1964, appellant had received transfers of property worth some $20,700 from Haupt. These transfers, occuring as they did within four

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[1] The facts with respect to the Haupt bankruptcy are set forth in prior decisions concerning the Haupt bankruptcy proceedings. *In re Ira Haupt & Co.*, 379 F. 2d 884 (2d Cir. 1967), *affirming*, 240 F. Supp. 10 (S. D. N. Y. 1965); *Henry Ansbacher & Co.* v. *Klebanow*, 362 F. 2d 569 (2d Cir. 1966), *affirming*, *In re Ira Haupt & Co.*, 253 F. Supp. 97 (S. D. N. Y. 1966); *In re Ira Haupt & Co.*, 361 F. 2d 164 (2d Cir. 1966); *Ira Haupt & Co.* v. *Klebanow*, 348 F. 2d 907 (2d Cir. 1965), *affirming, per curiam*, *In re Ira Haupt & Co.*, 234 F. Supp. 167 (S. D. N. Y. 1964); *Klebanow* v. *New York Produce Exchange*, 344 F. 2d 294 (2d Cir. 1965), *reversing*, 232 F. Supp. 965 (S. D. N. Y. 1964); *In re Ira Haupt & Co.*, 343 F. 2d 726 (2d Cir.), *cert. denied*, *Klebanow* v. *Chase Manhattan Bank*, 382 U. S. 890 (1965), *affirming*, 234 F. Supp. 167 (S. D. N. Y. 1964); *In re Ira Haupt & Co.*, 274 F. Supp. 1007 (S. D. N. Y. 1967); *In re Ira Haupt & Co.*, 252 F. Supp. 339 (S. D. N. Y. 1966); *In re Ira Haupt & Co.*, 240 F. Supp. 369 (S. D. N. Y. 1965); *Klebanow* v. *Funston*, 35 F. R. D. 518 (S. D. N. Y. 1964).

months of the filing of the petition in bankruptcy, could have, if they met certain other requirements, constituted voidable preferences as described in Section 60a of the Bankruptcy Act (the "Act"), 11 U. S. C. §96a,[2] and, if so, might be avoided by the Trustee in Bankruptcy under Section 60b, 11 U. S. C. §96b.[3]

On March 30, 1964, a petition under Section 321 of the Act, 11 U. S. C. §721, was filed with the District Court in the pending bankruptcy proceeding, purportedly on behalf of Haupt. This petition called for the initiation of a Chapter XI [§§301-399 of the Act] "arrangement" which is defined as "any plan of a debtor for the settlement, satisfaction, or extension of the time of payment of his unsecured

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[2] The elements of a preferential transfer are described in Section 60a(1):

> "A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class."

[3] Section 60b provides:

> "Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent. Where the preference is voidable, the trustee may recover the property or, if it has been converted, its value from any person who has received or converted such property, except a bona-fide purchaser from or lienor of the debtor's transferee for a present fair equivalent value: . . ."

debt upon any terms." Section 306(1), 11 U. S. C. §706 (1).[4]

On June 10, 1964, the Referee in Bankruptcy granted a motion to dismiss the Chapter XI petition on the ground that the petition was not the voluntary act of Haupt in that Haupt's managing partner, Morton Kamerman, did not join in the Chapter XI petition. The Referee's order was affirmed, *In re Ira Haupt & Co.*, 234 F. Supp. 167 (S. D. N. Y. 1964), *affirmed*, 343 F. 2d 726 and 348 F. 2d 907 (2d Cir. 1965).

By order and decree dated June 26, 1964, Haupt was adjudged bankrupt. Appellee was appointed Trustee and has acted as such since he qualified on October 7, 1964.

Meanwhile, appellant had filed with the Bankruptcy Court a proof of debt in the amount of $11,600 against Haupt which has never been allowed or disallowed. By notice of motion dated May 20, 1966, the Trustee instituted a proceeding objecting to the claim of appellant and requesting that the claim be disallowed unless appellant surrendered and turned over to the bankrupt estate the sum of

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[4] The Bankruptcy Act is divided into 14 chapters. Of direct pertinence here are:

> *Chapters I to VII*, consisting of Sections 1-72 of the Act, which are applicable to ordinary, or straight, bankruptcy proceedings whether voluntary or involuntary.
>
> *Chapter XI*, consisting of Sections 301-399 of the Act, which provides for arrangements with creditors, both for corporations and individuals.
>
> The other chapters deal with the reorganization of railroads (Chapter VIII), the reorganization of municipal corporations (Chapter IX), the reorganization of other corporations (Chapter X), real property arrangements (Chapter XII), wage earners' plans (Chapter XIII), and Maritime Commission liens (Chapter XIV).

$20,700 with interest, which represented the voidable preference mentioned above.

Appellant moved to dismiss the Trustee's application and objection as time barred. In his original decision, the Referee agreed with appellant and dismissed the Trustee's application. However, on reargument, he reversed himself and held that the Trustee's application was timely. The District Court affirmed and appellant brought this appeal.

Issue

Both parties agree that the two-year statute of limitations of Section 11e, 11 U. S. C. §29e, is applicable. See *Herget* v. *Central National Bank,* 324 U. S. 4 (1945). Section 11e provides:

> "A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy. . . ."

The issue on this appeal centers on the question of when does the period of limitation begin to run, *i.e.,* what is the "date of adjudication" referred to in Section 11e.[5] The Trustee argues that it is the actual date that Haupt was

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[5] "Date of adjudication" is defined in Section 1 (12), 11 U. S. C. §1 (12), as follows:

> " 'Date of adjudication' shall mean the date of the filing of any petition which operates as an adjudication, or the date of entry of a decree of adjudication, or if such decree is appealed from, then the date when such decree is finally confirmed or the appeal is dismissed."

adjudged a bankrupt—June 26, 1964. Thus, the Trustee's claim made on May 20, 1966, would be within the two-year period.

Appellant claims that the "date of adjudication" is the date on which the Chapter XI petition was filed—March 30, 1964. In support of this contention, appellant relies on Section 302, 11 U. S. C. §702,[6] which provides in part: that "the date of adjudication shall be taken to be the date of the filing of the petition under section 321 or 322 of this Act except where an adjudication had previously been entered." If the "date of adjudication" is taken to be the date of the filing of the Chapter XI petition, March 30, 1964, the Trustee's application to avoid the preferential transfer, filed on May 20, 1966, was beyond the two-year period.

The Referee's opinion on the reargument and the District Court's opinion affirming the Referee's order, both determined that Section 391, 11 U. S. C. §791, was applicable to this case to *suspend* the two-year statute of limitations of Section 11e while the arrangement proceeding was pending. Section 391 provides:

> "All statutes of limitation affecting claims provable under this chapter [Chapter XI] and the

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[6] Section 302 provides:

> "The provisions of chapters 1 to VII [the 'straight bankruptcy provisions], inclusive, of this Act shall, insofar as they are not inconsistent with or in conflict with the provisions of this chapter [Chapter XI], apply in proceedings under this Chapter: . . . For the purposes of such application the date of the filing of the petition in bankruptcy shall be taken to be the date of the filing of an original petition under section 322 of this Act, and the date of adjudication shall be taken to be the date of the filing of the petition under section 321 or 322 of this Act except where an adjudication had previously been entered."

> running of all periods of time prescribed by this Act in respect to the commission of acts of bankruptcy, the recovery of preferences and the avoidance of liens and transfers shall be suspended while a proceeding under this chapter is pending and until it is finally dismissed."

The District Court, however, also held that the "date of adjudication" which started the running of the statute of limitations of Section 11e, was the date Haupt actually was adjudicated a bankrupt on June 26, 1964. In support of this holding, the district court relied upon Section 378 (1), 11 U. S. C. §778 (1), which provides:

> "Upon the entry of an order directing that bankruptcy be proceeded with——
>
> (1) in the case of a petition filed under section 321 of this Act, the bankruptcy proceeding shall be deemed reinstated and thereafter shall be conducted, so far as possible, as if such petition under this chapter had not been filed; . . ."

If the Chapter XI petition "had not been filed," the date of adjudication would be the date that Haupt was actually adjudged a bankrupt—June 26, 1964. The statute of limitations not beginning to run until that date, the Trustee's application on May 20, 1966, was timely.

It is obvious that if a statute of limitations has not yet commenced to run, there will be no need to suspend its running. We believe that the court below was correct in holding that Section 378(1) is controlling in this case and that the statute of limitations of Section 11e did not begin

to run until the date Haupt was actually adjudged a bankrupt. Consequently, we find it unnecessary to decide whether the Referee and the court below were correct in their holding that Section 391 operates to suspend the running of the statute of limitations.

Section 302

We cannot agree with appellant's contention that by virtue of Section 302, the statute of limitations began to run from the date of the filing of the Chapter XI petition. Section 302 provides in pertinent part:

> "*The provisions of chapter I to VII, inclusive, of this Act shall,* insofar as they are not inconsistent with or in conflict with the provisions of this chapter, *apply in proceedings under this chapter* [*Chapter XI*]. . . . For the purposes of such application . . . the date of adjudication shall be taken to be the date of the filing of the petition under section 321 or 322 of this Act except where an adjudication had previously been entered" (emphasis supplied).

The difficulty with appellant's contention is that, after a petition for an arrangement has been dismissed, we are no longer dealing with a proceeding under Chapter XI. Section 302 merely purports to indicate that certain provisions of the straight bankruptcy chapters are applicable to a Chapter XI proceeding, not *vice versa*. If this distinction is not apparent from the language of Section 302 itself, Section 301, 11 U. S. C. §701, makes it quite clear:

> "The provisions of this chapter [Chapter XI] shall apply exclusively to proceedings under this chapter."

Appellant cites several cases in alleged support of its position. *In re Setzler,* 73 F. Supp. 314, 316 (S. D. Cal. 1947); *United States* v. *Sampsell,* 193 F. 2d 154, 155 (9th Cir. 1951); and *Henkin* v. *Rockower, Inc.,* 259 F. Supp. 202, 204 (S. D. N. Y. 1966). Appellant places great reliance upon *Henkin* v. *Rockower. Henkin* involved a Chapter XI arrangement initiated by the filing of a Section 322 petition. The petition for arrangement was dismissed and there was an adjudication of bankruptcy. Subsequently, the Trustee, as here, sued to avoid a preferential transfer, and the defense of the statute of limitations was raised. Although the court held that the statute of limitations had not run regardless of the date chosen to start its running, it did say that Section 302 was applicable and that the period began to run from the date of the filing of the Chapter XI petition. A significant difference between *Henkin* and the present case is that in *Henkin* the Chapter XI arrangement proceeding was initiated by a Section 322 petition whereas here it was initiated by a Section 321 petition.

Under Chapter XI, two types of petitions for arrangement may be filed. If no proceeding is then pending under Chapters I-VII, the petition is filed under Section 322, 11 U. S. C. §722 of the Act.[7] But if a bankruptcy proceeding is pending, as in the present case, the petition

[7] Section 322 provides:

> "If no bankruptcy proceeding is pending, a debtor may file an original petition under this chapter with the court which would have jurisdiction of a petition for his adjudication."

for an arrangement is properly filed pursuant to Section 321, 11 U. S. C. §721.[8]

Section 378 provides for the procedure to be followed after a petition for a Chapter XI arrangement has been dismissed.

> "Upon the entry of an order directing that bankruptcy be proceeded with—
>
> (1) in the case of a petition filed under section 321 of this Act, the bankruptcy proceeding shall be deemed reinstated and thereafter shall be conducted, so far as possible, as if such petition under this chapter had not been filed; and
>
> (2) in the case of a petition filed under section 322 of this Act, the proceeding shall be conducted, so far as possible, in the same manner and with like effect as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered on the day when the petition under this chapter [Chapter XI] was filed; . . ."

An analysis of Section 378 indicates that it, rather than Section 302, is the controlling provision *after* the Chapter XI proceeding has been dismissed.[9] While the decision in

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[8] Section 321 provides:

> "A debtor may file a petition under this chapter in a pending bankruptcy proceeding either before or after his adjudication."

Thus, a Chapter XI arrangement may be referred to as a "Section 321 case" or a "Section 322 case," depending upon which petition initiated the proceeding.

[9] "Apart from §§338, 354 [not relevant here] and 378, the provisions of Chapter XI do not govern the future conduct of the proceedings after bankruptcy has been directed." 9 Collier, Bankruptcy, ¶10.10, p. 510 (1964 ed.).

Henkin that the two-year period began to run on the date of the filing of the Chapter XI petition under Section 322 was not critical, since the court held the trustee's action to have been timely even on that basis, we disapprove of so much of the reasoning as relied on Section 302. We need not determine whether choice of the date of the filing of the Chapter XI petition rather than of actual adjudication was nevertheless correct on the basis of Section 378(2). Whatever may be the situation as to original Chapter XI petitions under Section 322, Section 378(2) by its terms does not apply to a Chapter XI petition under Section 321 in a pending bankruptcy. Where a Chapter XI proceeding has been initiated by a Section 321 petition, as in the present case, Section 378(1) is applicable and there is nothing in Section 378(1) to suggest that the date of adjudication should be any date other than the actual date that the person was adjudged a bankrupt.

> "It is clear that in a case where bankruptcy proceedings were pending at the time the petition for arrangement was filed, that is to say a §321 case, the Referee, where the plan for arrangement is not confirmed, must restore the status quo ante and proceed as though the petition for arrangement had not been filed." *In re Johnson Construction, Inc.,* 182 F. Supp. 576, 577 (D. C. Cal. 1960).

The other cases upon which appellant relies are also not persuasive. In *United States* v. *Sampsell, supra,* the court was concerned with the status of an indebtedness validly incurred by a debtor in possession *during* the

administration of a proceeding under Chapter XI and, hence, quite properly referred to Section 302.

The statement from *In re Setzler, supra,* upon which appellant relies was mere dictum in that case. Furthermore, since there was no reference to any particular section of the Act, it is impossible to determine whether the court was referring to Section 302 or to Section 378.

Appellant has made a rather exhaustive survey of the bankruptcy law in an effort to show that "there is no relevant difference between a Section 321 and Section 322 Chapter XI petition because of the wording of Section 378." (Appellant's brief, p. 27.) Appellant's argument is that the differences in the wording of Sections 378(1) and 378(2) result from certain practical differences between the Section 321 petition and the Section 322 petition, but that both were intended to reach the same basic result, *i.e.,* retroactive dates of adjudication. However, the difference in statutory language reflects the difference in the procedural posture of the two situations, and whatever might be the correct result if this case arose from a Section 322 petition, there is no basis for treating it as if it were.

For the reasons stated above, the decision of the District Court is affirmed.

Memorandum Opinion of Judge Motley

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In Bankruptcy.

No. 64 B 259

In the Matter

of

IRA HAUPT & CO.,
A Limited Partnership,

Bankrupt.

CONSTANCE BAKER MOTLEY, D. J.

MEMORANDUM OPINION ON PETITION TO REVIEW

Petitioner, Kamerman and Kamerman, seeks review of an order of the Hon. Edward J. Ryan, Referee in Bankruptcy, dated December 14, 1966. The order in question granted the Trustee's motion for reargument of a motion made by Petitioner and previously granted by the Referee. Upon reargument, the Referee reversed his prior decision in favor of Petitioner and denied Petitioner's motion.

The reargued motion was to dismiss the Trustee's application objecting to a claim by Petitioner against the bankrupt, Ira Haupt & Co., and seeking to recover from Petitioner a preferential payment of $20,700, plus interest. Petitioner's motion to dismiss was originally granted on

the ground that the two year period of time during which the Trustee could assert his claim for recovery of a voidable preference prescribed by Section 11 e of the Bankruptcy Act (11 U. S. C. 29 e) had run against the claim here.

The facts relevant to this review are as follows:

1) On March 23, 1964, an involuntary petition in bankruptcy was filed against Ira Haupt & Co. following its suspension from further trading on the New York Stock Exchange.

2) Prior to the filing of the foregoing involuntary petition in bankruptcy, Petitioner received payment from a liquidator of Haupt's business aggregating $20,700.

3) On March 30, 1964, a petition under Chapter XI, Section 321 of the Bankruptcy Act (11 U. S. C. 721) was filed, purportedly on behalf of Haupt in the pending bankruptcy proceeding.

4) Thereafter, a motion was made to dismiss the Chapter XI petition and on June 10, 1964, the Referee granted the motion on the ground, inter alia, that the Chapter XI petition was not the voluntary act of Haupt.

5) By order and decree dated June 26, 1964, Haupt was adjudicated a bankrupt.

6) Petitioner filed a proof of debt against the bankrupt which has never been allowed or disallowed.

7) On October 6, 1964, the Trustee of the Estate of the Bankrupt was appointed, has since been qualified, and is now acting as such Trustee.

8) On May 20, 1966, the Trustee instituted proceedings objecting to Petitioner's claim and seeking disallowance of the claim, in accordance with Section 57 g of the Bank-

ruptcy Act (11 U. S. C. 93 g) unless Petitioner surrendered to the Trustee the sum of $20,700 with interest, said monies representing voidable preferences under Section 60 a and b of the Bankruptcy Act (11 U. S. C. 96 a and b).

9) Petitioner filed an answer dated June 28, 1966, to the Trustee's objection and application alleging that the Trustee's application was time barred by the provisions of Sections 11 e and 302 of the Bankruptcy Act (11 U. S. C. 29 e and 702).

10) On the same day on which Petitioner's answer was filed, Petitioner also filed its motion to dismiss the Trustee's application upon the ground that it failed to state a claim upon which relief could be granted in that it appeared that the application was barred by the provisions of Section 11 e and 302 of the Bankruptcy Act since the claim was not made within two years of the filing of the petition for an arrangement under Chapter XI by Ira Haupt & Co.

The provisions of the Bankruptcy Act cited by Petitioner in support of its motion to dismiss are as follows:

> A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy. Where, by any agreement, a period or proceeding upon any claim, or for presenting or filing any claim, proof of claim, proof of loss, demand, notice, or the like, or where in any proceed-

ing, judicial or otherwise, a period of limitation is fixed, either in such proceeding or by applicable Federal or State law, for taking any action, filing any claim or pleading, or doing any act, and where in any such case such period had not expired at the date of the filing of the petition in bankruptcy, the receiver or trustee of the bankrupt may, for the benefit of the estate, take any such action or do any such act, required of or permitted to the bankrupt, within a period of sixty days subsequent to the date of adjudication or within such further period as may be permitted by the agreement, or in the proceeding or by applicable Federal or State law, as the case may be. (Bankruptcy Act §11 e, 11 U. S. C. §29 e).

* * *

The provisions of chapters 1-7 of this title shall, insofar as they are not inconsistent with or in conflict with the provisions of this chapter, apply in proceedings under this chapter. For the purposes of such application, provisions relating to "bankrupts" shall be deemed to relate also to "debtors", and "bankruptcy proceedings" or "proceedings in bankruptcy" shall be deemed to include proceedings under this chapter. For the purposes of such application the date of the filing of the petition in bankruptcy shall be taken to be the date of the filing of an original petition under section 722 of this title, and the date of adjudication shall be taken to be the date of the filing of the petition under section 721 or 722 of this title except where an adjudication had previously been entered. (July 1, 1898, ch. 541, §302, as added June 22, 1938, ch. 575,

§1, 52 Stat. 905.) (Bankruptcy Act §302, 11 U. S. C. §702).

Relying on these provisions, Petitioner claims that the date of the filing of the Chapter XI petition in this case, i.e. March 30, 1964, is the time from which the two year period of limitation began to run, so that the Trustee's application, when filed on May 20, 1966, was time barred by March 30, 1966.

In support of its claim, Petitioner cites *Henkin* v. *Rockower Bros., Inc.,* 259 F. Supp. 202 (S. D. N. Y. 1966) in which the court held that Section 11 e must be read together with Section 302, so that Section 11 e commences to run on the date of the filing of the Chapter XI petition, i.e. the "date of adjudication".

When Petitioner's motion was first heard, the Referee agreed with the Petitioner and entered an order on October 21, 1966 dismissing the Trustee's application. On reargument, the Referee reversed his decision and denied Petitioner's motion to dismiss the Trustee's application.

The Referee's order of December 14, 1966 provides in pertinent part as follows:

> ORDERED, ADJUDGED AND DECREED, that upon reargument the decision on motion of Kamerman & Kamerman, dated October 21, 1966, be and the same hereby is reversed and withdrawn; and it is further
>
> ORDERED, ADJUDGED AND DECREED, that in accordance with Section 391 of the Bankruptcy Act, 11 U. S. C., Section 791, the running of all periods of time prescribed by the Bankruptcy Act in respect

to the recovery of preferences and the avoidance of liens and transfers by the Trustee in Bankruptcy was suspended during the period March 30, 1964 through June 26, 1964, during which time the proceeding under Chapter XI of the Bankruptcy Act purportedly filed by Ira Haupt & Co. was pending

and it is further

ORDERED, ADJUDGED AND DECREED, that upon the dismissal of the aforesaid Chapter XI proceeding in accordance with the provisions of this Court's order and decree of June 26, 1964, Section 378(1) of the Bankruptcy Act, 11 U. S. C.; Section 778(1), became the operative, applicable statutory provision relating to the ordinary bankruptcy proceeding under Chapters I through VII of the Bankruptcy Act in respect of Ira Haupt & Co. and in accordance therewith the ordinary bankruptcy proceeding instituted prior to the filing of the petition under Chapter XI of the Bankruptcy Act is reinstated and thereafter conducted, insofar as possible, as if the petition under Chapter XI of the Bankruptcy Act had not been filed; and it is further

ORDERED, ADJUDGED AND DECREED, that Section 302 of Chapter XI of the Bankruptcy Act, 11 U. S. C., Section 702, a statutory provision enabling the application of general bankruptcy provisions contained in Chapters I through VII of the Bankruptcy Act to proceedings under Chapter XI of said Act, insofar as the same are not inconsistent with or in conflict with the provisions of Chapter XI of the Bankruptcy Act, has no application to the instant ordinary bankruptcy proceedings under Chapters I

through VII of the Bankruptcy Act involving Ira Haupt & Co. and now pending before this Court; and it is further

ORDERED, ADJUDGED AND DECREED, that the Trustee's application under Section 57g of the Bankruptcy Act, 11 U. S. C., Section 93g, is not barred by the running of the period of time contained in Section 11e of the Bankruptcy Act, 11 U. S. C., Section 29e; and it is further * * *"

Upon this review, Petitioner seeks reversal of the Referee's order upon reargument and reinstatement of his order of October 21, 1966.

The Referee's order of December 14, 1966 is affirmed for the following reasons:

1) There are relevant and significant differences for the purposes of this case between an original petition under Section 322 of Chapter XI (11 U. S. C. 722) (a petition filed where no bankruptcy proceeding is pending) and petitions filed pursuant to Section 321 of Chapter XI, (11 U. S. C. 721) (a petition filed in a pending bankruptcy proceeding).

2) These distinctions are important as Section 378 (1) and 378 (2) (11 U. S. C. 778 (1) and 778 (2)) make clear.

These provisions are as follows:

§778. Procedure under order directing that bankruptcy be proceeded with.

Upon the entry of an order directing that bankruptcy be proceeded with—

(1) in the case of a petition filed under section 721 of this title, the bankruptcy proceeding shall be deemed reinstated and thereafter shall be conducted, so far as possible, as if such petition under this chapter had not been filed; and

(2) in the case of a petition filed under section 722 of this title, the proceeding shall be conducted, so far as possible, in the same manner and with like effect as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered on the day when the petition under this chapter was filed; and the trustee nominated by creditors under this chapter shall be appointed by the court, or, if not so nominated or if the trustee so nominated fails to qualify within five days after notice to him of the entry of such order, a trustee shall be appointed as provided in section 72 of this title.

3) Section 391 of the Bankruptcy Act, 11 U. S. C. 791, is an applicable provision completely overlooked by the Referee when he entered his first order.

That provision provides as follows:

§791. Suspension of statutes of limitation, etc.

All statutes of limitation affecting claims provable under this chapter and the running of all periods of time prescribed by this title in respect to the commission of acts of bankruptcy, the recovery of preferences and the avoidance of liens and transfers shall be suspended while a proceeding under this chapter is pending and until it is finally dismissed.

4) This is a Section 321 proceeding. June 26, 1964 is the date of actual adjudication entered in the ordinary involuntary bankruptcy proceeding commenced herein on March 23, 1964. June 26, 1964 was three months after the aborted Chapter XI proceeding was commenced in this ordinary bankruptcy proceeding on March 30, 1964. The March 30, 1964 date would be the constructive date of adjudication if Section 302 were applicable to a Section 321 proceeding. However, Section 391 is applicable. Consequently, the running of the period of time during which the Trustee might file his application was suspended for three months during the pendency of the aborted Chapter XI proceeding.

5) Section 302 is applicable only to Chapter XI proceedings as provided by Section 301 of the Bankruptcy Act (11 U. S. C. 701).[1]

That provision provides as follows:

> The provisions of this Chapter [XI] shall apply exclusively to proceedings under this Chapter.

6) Section 1(12) of the Bankruptcy Act (11 U. S. C. 1(12) defines the date of adjudication applicable to the Trustee's right to press his claim of voidable preference. That action provides:

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[1] 8 Collier, Bankruptcy §1.01 p. 3 (14th Ed., 1964):

> Although numerous provisions in other chapters of the Bankruptcy Act are applicable to an arrangement proceeding under Chapter XI, the converse is not true, and the provisions of Chapter XI do not apply to proceedings under other chapters of the Act. [See also ftn. 3 p. 3.]

> 'Date of adjudication' shall mean the date of the filing of any petition which operates as an adjudication, or the date of entry of a decree of adjudication, or if such decree is appealed from, then the date when such decree is finally confirmed or the appeal is dismissed.

When the Chapter XI proceeding was dismissed on June 10, 1964, the ordinary bankruptcy proceeding was deemed reinstated, Section 378(1) (11 U. S. C. 778 (1), and was thereafter conducted so far as possible, as if the petition under Chapter XI had never been filed. *In re Dejay Stores, Inc.*, 220 F. Supp. 497 (S. D. N. Y. 1963); See *In re Johnston Construction, Inc.*, 182 F. Supp. 576, 577 (D. C. Cal. 1960). That became the date of adjudication for all purposes. Haupt was adjudicated a bankrupt in the ordinary proceeding on June 26, 1964.

7) This case is governed solely by Chapters I through VII of the Bankruptcy Act and the period of limitation contained in Section 11e of the Act (11 U. S. C. 29e) did not commence to run until, at the earliest, June 27, 1964, the day following entry of the decree of adjudication herein.

8) *Henkin* v. *Rockower, supra,* relied upon by Petitioner, is distinguishable since it appears that case involved a Section 322 proceeding (a Chapter XI petition filed where no bankruptcy proceeding is pending). In addition, the *Henkin* decision did not consider the effect and applicability of Section 391 of the Bankruptcy Act (11 U. S. C. 791).

9) The adjudication of Haupt as a bankrupt on June 26, 1964, was not based upon any of the grounds enumerated in Section 376 of the Bankruptcy Act (11 U. S. C.

776) as the basis for dismissing a Chapter XI proceeding and for entering a decree adjudicating the debtor a bankrupt. The adjudication of Haupt was entered in the involuntary proceeding and was based upon the failure of Haupt to file an answer. That decree of adjudication recognized the applicability of Section 378(1) and reads: Ordered, that the interrupted bankruptcy be proceeded with under the general provisions of the Bankruptcy Act.

10) There is no merit to Petitioner's contention that the Referee's order of December 14, 1966 should be reversed because the Trustee's motion for reargument failed to comply with the provisions of Rule 9(m) of the General Rules of this Court. Motion practice in the Bankruptcy Court is governed by the Bankruptcy Rules of this Court and the Rules for Motion Practice Before The Referees In Bankruptcy For The Southern District of New York.

The order of December 14, 1966 is affirmed.

Dated: New York, New York
August 15, 1967

So Ordered:

CONSTANCE BAKER MOTLEY

Original Decision of Referee Ryan, Dated Oct. 21, 1966

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In Bankruptcy No. 64-B-259

In the Matter

of

IRA HAUPT & Co., a Limited Partnership

Bankrupt.

DECISION ON MOTION OF KAMERMAN & KAMERMAN

Kamerman & Kamerman filed a proof of claim in these proceedings. By application dated May 20, 1966, the trustee in bankruptcy moved under §57g of the Bankruptcy Act for an order disallowing the proof of claim unless the claimant with a time fixed by the Court surrendered to the trustee the sum of $20,700.00 with interest. The trustee contends that the claimant Kamerman & Kamerman received a preference voidable under the Bankruptcy Act within the four month period prior to the commencement of the bankruptcy proceedings herein.

Kamerman & Kamerman by motion dated June 28, 1966 moved for an order dismissing the trustee's application on the ground that it is barred by the two year limitation period set forth in §11(e) of the Bankruptcy Act. The claimant contends that §11(e) is made applicable by §302 of the Bankruptcy Act.

Original Decision of Referee Ryan

An involuntary petition in bankruptcy was filed against Ira Haupt & Co., on March 23, 1964. A petition in proceedings for an arrangement was filed in the name of the alleged bankrupt on March 30, 1964. By order dated June 26, 1964 the proceedings for an arrangement under Chapter XI of the Bankruptcy Act were dismissed and the debtor was adjudicated a bankrupt.

Section 11(e) of the Bankruptcy Act provides in pertinent part:

> "e. A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy. * * *"

Section 302 of the Bankruptcy Act provides:

> "Sec. 302. The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent with or in conflict with the provisions of this chapter, apply in proceedings under this chapter. For the purposes of such application, provisions relating to 'bankrupts' shall be deemed to relate also to 'debtors,' and 'bankruptcy proceeding' or 'proceedings in bankruptcy' shall be deemed to include proceedings under this chapter. For the purposes of such application the date of the filing of the petition in bankruptcy shall be taken to be the date of the filing of an original petition under section 322 of this Act, and the date of adjudication

shall be taken to be the date of the filing of the petition under section 321 or 322 of this Act except where an adjudication had previously been entered."

Kamerman & Kamerman contend that the two year period of limitation began to run on March 30, 1964 so that the trustee's application to recover the allegedly preferential payment was time-barred on March 30, 1966.

In *Henkin* v. *Rockower Bros., Inc.*, — F. Supp. —, (S. D. N. Y. 1966) Judge Levet held that where a Chapter XI proceeding is commenced by the filing of an original petition in proceedings for an arrangement under §322 of the Bankruptcy Act, section 11(e) must be read with §302 so that the two year period commences to run from the date of the filing of the original petition for an arrangement.

The trustee argues that the instant case is not governed by §302, but by §378, subdivision 1 of the Bankruptcy Act which provides in part as follows:

"Sec. 378. Upon the entry of an order directing that bankruptcy be proceeded with—

(1) in the case of a petition filed under section 321 of this Act, the bankruptcy proceeding shall be deemed reinstated and thereafter shall be conducted, so far as possible, as if such petition under this chapter has not been filed; * * *"

It is the trustee's contention that the two year period did not commence to run until June 26, 1964, the date of the order of adjudication of Ira Haupt & Co. as a bankrupt, with the result that the instant proceeding was

timely brought. The trustee seeks to distinguish the holding of the Henkin case by showing that that case was filed under §322 of the Bankruptcy Act, whereas the instant petition under Chapter XI was filed in a pending bankruptcy proceeding under §321 of the Act.

The attempted distinction of the *Henkin* case is not valid. The language of §302 is clear. No reason suggests itself why there should be the distinction which the trustee asks the Court to find.

Section 378(1) of the Act is a general provision governing subsequent procedures in an enusing bankruptcy. The revived bankruptcy proceeding by the terms of the statute shall be conducted only *so far as possible* as if the arrangement petition had not been filed. Section 378 was new when enacted in the Chandler Act. Its provisions were patterned after §238. Subdivision 1 of §378 appears to be unnecessary except for clarity. This has been noted by a member of the Drafting Committee of the Chandler Act.[1]

The trustee also argues that the arrangement petition which purported to be filed in behalf of Ira Haupt & Co., was a nullity and of no force and effect aganist the trustee.

Evidence on this contention was not offered, but reference was made to that part of the decision dated June 10, 1964 in which I found in substance that the arrangement proceedings under Chapter XI of the Bankruptcy Act had been commenced by the committee of creditors rather than Haupt itself.

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[1] *Weinstein,* The Bankruptcy Law of 1938, A Comparative Analysis, pages 289, 243.

Original Decision of Referee Ryan

This finding was made in deciding, *inter alia,* a motion to dismiss the proceeding. The result well might be as the trustee contends if the petition had been a forgery filed with no cooperation of any person authorized to act on behalf of Ira Haupt & Co. However, considering all the circumstances as found to have existed when the petition was filed, I am of the opinion that the proceedings for an arrangement had sufficient viability to require the applicability of §302 and other pertinent provisions of the Bankruptcy Act.

The motion of Kamerman & Kamerman to dismiss the application of the trustee is granted. Settle an appropriate order.

Dated: New York, New York
October 21, 1966

EDWARD J. RYAN

Decision of Referee Ryan on Reargument

I am constrained to concede that I must confess error in making my original decision. It was bottomed upon an attempt to reconcile the statutes which had been referred to me by the parties, and I will not advert to the fact that nobody suggested to me that Section 391 might apply to this case; and Section 391 provides the simple catalyst that resolves all of the problems that the parties had discussed at the time of the original motion.

It is clearly the intent of Section 391 that the recovery of a preference by way of a motion, which the trustee has originally brought on, is exactly the type of recovery of a preference which the statute of limitations as to which is tolled during the period that the Chapter XI proceeding is viable. Section 302 relates only to the application of the provisions of Chapter I through VII to a Chapter XI proceeding while the Chapter XI proceedings are ongoing.

The various definitions that are set forth in Section 302 are necessary to be supplied only for purposes of the application of the provisions of Chapters I to VII during the arrangement proceeding. Section 391 clearly in simple language suspends the two-year provision set forth in Section 11(e) while an arrangement proceeding is pending.

I wish, Mr. Paloger, that I were able to rely on the bible, Collier in Bankruptcy, and go no further. I am afraid though that Collier is wrong when Collier says that Section 391 only applies to a Section 322 case. I rule it applies to both a 321 and a 322 case (Transcript Nov. 18, 1966, pp. 35-36).

APPENDIX "B"

Bankruptcy Act

Section 11e, 11 U. S. C. §29e

"A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy. Where, by any agreement, a period of limitation is fixed for instituting a suit or proceeding upon any claim, or for presenting or filing any claim, proof of claim, proof of loss, demand, notice, or the like, or where in any proceeding, judicial or otherwise, a period of limitation is fixed, either in such proceeding or by applicable Federal or State law, for taking any action, filing any claim or pleading, or doing any act, and where in any such case such period had not expired at the date of the filing of the petition in bankruptcy, the receiver or trustee of the bankrupt may, for the benefit of the estate, take any such action or do any such act, required of or permitted to the bankrupt, within a period of sixty days subsequent to the date of adjudication or within such further period as may be permitted by the agreement or in the proceeding or by applicable Federal or State law as the case may be".

Section 301, 11 U. S. C. §701

"The provisions of this chapter shall apply exclusively to proceedings under this chapter."

Bankruptcy Act

Section 302, 11 U. S. C. §702

"The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent with or in conflict with the provisions of this chapter, apply in proceedings under this chapter. For the purposes of such application, provisions relating to 'bankrupts' shall be deemed to relate also to 'debtors,' and 'bankruptcy proceedings' or 'proceedings in bankruptcy' shall be deemed to include proceedings under this chapter. For the purposes of such application the date of the filing of the petition in bankruptcy shall be taken to be the date of the filing of an original petition under section 322 of this Act, and the date of adjudication shall be taken to be the date of the filing of the petition under section 321 or 322 of this Act except where an adjudication had previously been entered."

Section 321, 11 U. S. C. §721

"A debtor may file a petition under this chapter in a pending bankruptcy proceeding either before or after his adjudication."

Section 322, 11 U. S. C. §722

"If no bankruptcy proceeding is pending, a debtor may file an original petition under this chapter with the court which would have jurisdiction of a petition for his adjudication."

Section 378, 11 U. S. C. §778

"Upon the entry of an order directing that bankruptcy be proceeded with——

"(1) in the case of a petition filed under section 321 of this Act, the bankruptcy proceeding shall be deemed reinstated and thereafter shall be conducted, so far as possible, as if such petition under this chapter had not been filed; and

"(2) in the case of a petition filed under section 322 of this Act, the proceeding shall be conducted, so far as possible, in the same manner and with like effect as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered on the day when the petition under this chapter was filed; and the trustee nominated by creditors under this chapter shall be appointed by the court, or, if not so nominated or if the trustee so nominated fails to qualify within five days after notice to him of the entry of such order, a trustee shall be appointed as provided in section 44 of this Act."